No. 643

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CHARLES ELMORE

Supreme Court of the United States

CHARLES YOUNG, *Appellant*

vs.

ANTHONY MASCI, *Appellee*

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

DANIEL THEW WRIGHT,
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W. F. ROBERTS CO. WASHINGTON D. C.

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It is obvious that appellee's counsel seeks to convey the impression that the case involves merely the construction of a valid statute, or the question whether one State will extend comity to a valid statute of another State. Of course neither of those questions are federal questions.

The position taken in the papers served for appellee, that we assumed the New York statute to be valid if applied and enforced to impose liability on Young, who was never within the legislative jurisdiction of New York, is refuted by the record.

The constitutional question was definitely and distinctly raised in the trial court by paragraphs 5 and 9 of the motion to strike out the amended complaint (R. 14-15) : by objection to the admission of the New York statute in evidence (R. 76-77) : by motion to direct a verdict at the conclusion of the evidence (R. 144-145) : by exception to the courts

charge to the jury (R. 155-156): by express reservation of these questions for appeal (R. 159-160): by the "Grounds for Appeal" (R. 165-170):

In New York *ex rel.* Bryant *v.* Zimmerman, 278 U. S. 63, 67; 73 L. Ed. 184, 187, was said:—

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

The New Jersey Court of Errors and Appeals recognized that appellant Young did not assume the statute to be valid to impose liability upon him. Beginning with the paragraph which starts: "The insistence of the appellant is that the New York statute can have no effect to impose liability upon an owner who is a resident of New Jersey and who was in New Jersey at the time of the occurrence complained of, when the lending or bailment took place in New Jersey."—and continuing to the end of the opinion, the Court of Errors and Appeals considers and decides whether the New York statute could, without violating the United States Constitution, impose liability upon Young under the circumstances of this case. In view of what was said in the opinion

it is evident that the Court of Errors and Appeals recognized that we were denying rather than assuming validity of the statute in so far as extra-territorial effect was claimed for it.

In view of the fact that the Court of Errors and Appeals actually decided the federal question adversely to Young the following cases are pertinent:—

In Manhattan Life Ins. Co. *v.* Cohen, 234 U. S. 123, 134; 58 L. Ed. 1245, 1253 reference is made to

> "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

In Miedreich *v.* Lauenstein, 232 U. S. 236, 243; 58 L. Ed. 584, 589 the court said:—

> "Where the state court holds that a Federal question is made before it, according to its practice and proceeds to determine it, this court will regard the question as duly made."

North Carolina R. Co. *v.* Zachary 232 U. S. 248, 257; 58 L. Ed. 591, 595 answers the objection that a Federal question was not properly raised, thus:—

> "But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."

In Chambers *v.* B. & O. R. Co. 207 U. S. 142, 148; 52 L. Ed. 143, 146, is said:—

> "The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error."

In Mallinckrodt Chemical Works *v.* Missouri, 238 U. S. 41, 49; 59 L. Ed. 1192, 1195, is said:—

> "There is a motion to dismiss, based upon the ground that the Federal questions here set up were not raised in the trial court, or in the Supreme Court of the state with sufficient definiteness to comply with Sec. 237 Judicial Code (act of March 3, 1911, 36 Stat. at L. 1087, 1156, Chap. 231, Comp. Stat. 1913, 968, 1214. It appears, however, from the opinion of the Supreme Court that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error. This is sufficient to confer jurisdiction upon this court and the motion to dismiss must be denied."

See also Chicago Rock Island and Pacific Ry. *v* Perry, 259 U. S. 548; 66 L. Ed. 1056, Syllabus 1.

The fact that the decision of the Constitutional question was essential to the judgment rendered by the New Jersey Court of Errors and Appeals, is established by considering that the amended complaint

pleaded the New York statute, and set out no other cause of action: a judgment for plaintiff, necessarily affirmed the validity of that statute. The same result follows from the charge of the Trial Court to the jury, the correctness of which was affirmed; the Trial Court charged:

> "As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability. * * * So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. * * * If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff. If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given by the defendant to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this

case. The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained."

From which it is manifest, that the New Jersey Court of Errors and Appeals could not have approved this charge, and decided the case, without affirming the validity of the New York Statute as applied to the case, all against the appellant's claim that the Statute so applied, violated the Constitution of the United States.

The cases cited by Appellee, as making against jurisdiction, are not very closely in point.

Michigan Cent. Railroad Co. *vs.* Mich. Sou. 60, U. S. 378, 15 L. Ed. 689 in substance holds that jurisdiction must appear by direct allegation or necessary intendment. Our reply to this is that it does appear and that the state court decided the Federal question in its opinion, and erroneously decided it.

Murdock *vs.* Memphis, 87 U. S. 590, 22 L. Ed. 429 presents a lengthy outline of the points essential to jurisdiction but we see nothing in it which leads to a conclusion that there was not drawn in question in the case sub judice, the validity of the New York statute if applied and enforced to impose liability upon Young who had never been in New York, and was not amenable to New York law.

Miller *v.* Cornwall R. R. 168 U. S. 131, 42 L. Ed. 409 holds that the validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial and is denied. We think this case supports our contention rather than that of the appellee. It has been our continuous protest that the New York legislature had no power to enact a law

which could impose liability upon an owner who is a resident of New Jersey and who was in New Jersey at the time of the occurrence complained of, when the lending or bailment took place in New Jersey, under the law of which state the bailor is not liable for the negligence of the bailee; and opinion of the Court of Errors and Appeals expressly recognizes that we so insisted.

If the above cases and those cited in the statement of jurisdiction filed by appellant did not entitle him to have the case reviewed by appeal, the rule now is that mistake in adopting the procedure of appeal when certiorari should have been taken, is not fatal. (Judicial Code, Section 237-c, as amended by Act of February 13, 1925, 43 Stat. 937; Title 28, USCA, Section 344, sub-division c.) One case illustrating this is R[illegible]he *v.* McDonald, 275 U. S. 449, 72 L. Ed. 365, where a writ of error was dismissed, certiorari granted, the case considered on its merits and judgment therein reversed. But the appeal was properly allowed in this case and that the motion to dismiss should be denied, is

Respectfully submitted,

DANIEL THEW WRIGHT
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Counsel for Appellant.

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vs.

ANTHONY MASCI, *Appellee*

BRIEF FOR APPELLANT

OCTOBER TERM 1932

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INDEX

	Page
Nature of the Case	1
Assignments of Errors	3
Argument	9
The Application of the N. Y. Statute Offends Sec. 10, Art. 1 of the Constitution	9
State Statutes Have No Extra-Territorial Operation	12
The Application of the N. Y. Statute Offends the 14th Amendment to the Constitution	17
Denial of Equal Protection of the Law	21

STATUTES CITED

Laws of New York 1929 V. 1, p. 82 Cahills Cons. L. N. Y. 1930, p. 2573	2

CASES CITED

Adair *vs.* U. S., 208 U. S. 161	18
Allgeyer *vs.* Louisiana, 165 U. S. 589	18
American Banana Co. *vs.* Fruit Co., 213 U. S. 347	12
Carter *vs.* Texas, 177 U. S. 442	21
Coppage *vs.* Kansas, 236 U. S. 14	19
Danke-Walker Co. *vs.* Bondurant, 257 U. S. 282	8
Dewey *vs.* Des Moines, 173 U. S. 193	15
Doran *vs.* Thompson, 76 N. J. L. 754	10
Fiske *vs.* Kansas, 274 U. S. 380	8

Page

Gavin *vs.* Cohen, 136 Atl. 330 10

Heiner *vs.* Donnan, 285 U. S. 312 19

Home Telephone Co. *vs.* Los Angeles, 227 U. S. 278 22

Lee *vs.* Hopkins, 118 U. S. 356 22

Meyers *vs.* Nebraska, 262 U. S. 399 20

Maurer *vs.* Brown, 106 N. J. L. 284 10

N. Y. L. E. *vs.* New Jersey Elec. Co., 60 N. J. L. 338 10

N. Y. Life Ins. Co. *vs.* Head, 234 U. S. 160 13

Pennoyer *vs.* Neff, 95 U. S. 714 12

Sanford *vs.* McDonald, 248 U. S. 185 12

Scott *vs.* McNeal, 154 U. S. 45 21

Twin City Pipe Co. *vs. Harding Co.*, 283 U. S. 353 20

Wolff Packing Co. *v.* Court of Indust. Rel., 262 U. S. 399 20

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No. 643

CHARLES YOUNG, *Appellant*

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BRIEF FOR APPELLANT

The case is here on appeal from a judgment of the New Jersey Court of Errors and Appeals, affirming against the appellant, a judgment which was rendered by the New Jersey Supreme Court for Passaic County, a trial court of original jurisdiction. The case is reported in 162 Atl. 623.

The authorities sustaining the jurisdiction of this Court on appeal, appear in appellant's "Brief Opposing Motion to Dismiss Appeal," to which reference is made.

NATURE OF THE CASE

The appellant, Young, was a citizen and resident of the State of New Jersey; Masci the appellee, a citizen and resident of the State of New York. One Balbino, a friend of Young, wishing to take his family for a pleasure ride, borrowed Young's automobile in New Jersey, for that purpose. (R. 43-13.)

There was no "hiring" of the automobile. The bailment took place in the State of New Jersey.

Young had no knowledge where Balbino intended to drive, and it is doubtful from the evidence whether Balbino knew himself at the time he borrowed the car. Young had not been in New York, had no knowledge of the Laws of New York, and the thought that Balbino might possibly drive the car out of the State of New Jersey never occurred to him. However, Balbino, after having accumulated his family, in his meanderings did journey into the City and State of New York, and there accidentally struck the appellee, Masci, who was a pedestrian upon the street of New York City.

Masci sued Young in the New Jersey Supreme Court for Passaic County. His Amended Complaint contained two counts (R. 1) both based upon a Statute of the State of New York, which was pleaded verbatim in the Amended Complaint and is as follows:—

> "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner." (Laws N. Y. 1929, Vol. 1, p. 82, Cahill's Cons. L. N. Y. 1930, p. 2573.)

From the inception of the case, the appellant Young contended that the application of the New York Statute to him in the case, violated parts of the Constitution of the United States.

The constitutional questions were raised in the trial court by Motion to Strike out the Amended Complaint (R. 5), by objection to the admission

of the New York Statute in evidence at the trial (R. 28), by Motion for a Non-Suit at the conclusion of plaintiff's evidence by Motion for a Directed Verdict at the conclusion of all the evidence (R. 75-76), and by exception to the Court's charge to the jury (R. 83-84). The trial resulted in a verdict for Masci and against Young for $14,000; remittitur of $4,000 and judgment for $10,000 against Young entered. (R. 11.) The constitutional questions were expressly specified for determination by the New Jersey Court of Errors and Appeals, which method seems to be appropriate practice in the State of New Jersey (R. 84).

ASSIGNMENT OF ERRORS

1. The New Jersey Court of Errors and Appeals erred in deciding that Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, which is as follows:

> "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

is valid and is not repugnant to Section 10 of Article 1 of the Constitution of the United States and not repugnant to the 14th Amendment of the Constitution of the United States in its application to the Appellant, said Charles Young, in this case.

2. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the Supreme Court of New Jersey, denying Defendant's motion to strike out the first and second counts of Plaintiff's Amended Complaint, which for cause of action set out Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted, and in deciding that said statute in its application to the Appellant in this case, was valid, and did not deny him equal protection of the Law, and did not deprive him of liberty and property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

3. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, in admitting in evidence at the trial, over the objection and exception of the defendant, Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted; and erred in deciding that such application of such statute to the Appellant, Charles Young, in this case was valid was not repugnant to the 14th Amendment to the Constitution of the United States, did not deny him equal protection of the law, and did not deprive him of liberty or property without due process of law.

4. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court in denying the motion of the Defendant, Charles Young, made at the close of all the evidence, to direct the jury to return a verdict in his favor, and erred in failing to decide that to apply said Sec. 59, Ch. 54 of the 1929 Laws of New York to Ap-

pellant, Charles Young, in this case would deprive him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States; would deprive him of his liberty to contract and make contracts, in violation of the 14th Amendment; would deny him the equal protection of the laws in violation of the 14th Amendment, and would violate Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of an existing contract of the Appellant, Charles Young.

5. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, and its action in charging the jury, over the objection and exception of the Defendant, Charles Young, as follows:

> "As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability. Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides that 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.'

"So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. This article or ordinance only relates to the use of the automobile and not to the question of negligence.

"If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff.

"If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given to use this car and operate it, permission given by the defendant to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this case.

"The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained."

and erred in deciding that Sec. 59, Ch. 54 of the 1929 Laws of New York as so applied to the Appellant, Charles Young, in this case, was valid and did not deprive him of liberty or property without due process of Law, did not deny him the equal protection of the Law, in violation of the 14th Amendment to the Constitution of the United States, and did not impair the obligation of an existing contract of the Appellant, Charles Young, in violation of Section 10 of Article 1 of the Constitution of the United States.

As to the parts of the Constitution invoked by Appellant the assignments of errors, five in number, (R. 95) challenge the judgment of the New Jersey Court of Errors and Appeals in that the application of the New York Statute to the appellant Young, in this case, is repugnant to Section 10 of Article I, and repugnant to the 14th Amendment of the Federal Constitution.

The appellant Young contends, and contended below:

I. That the application to him of the New York Statute in this case, impaired the obligations of his existing contract of bailment made by him with Balbino in the State of New Jersey in the loaning of the car, and by which contract, valid and lawful in the State of New Jersey where made, he was by the law of the state in which it was made, protected against and exempted from the very liability for Balbino's negligence, which the Statute of New York would place upon him, if applied to him. This is in violation of Section 10, of Article I, of the Federal Constitution.

II. The appellant Young contends that the application of the New York Statute to him in this case, deprives him of liberty without due process of law, in that it deprives him of liberty to make and to enjoy his immunity from liability under his contract of bailment valid by the law of his domicile in the state where it was made, and which by the law of that state protects him against this particular liability for the Bailee's negligence.

III. The appellant Young contends that the application of the New York Statute to him in this case deprives him of property without due process of law, in that it imposes a liability in personam upon him, who was never in New York State, was never amenable to its laws, and in satisfaction of that personal liability deprives him of property which was never in the State of New York and never amenable to its laws, in violation of the 14th Amendment.

IV. The appellant Young claims that the application of the New York Statute to him in this case denies him the equal protection of the laws of New Jersey, which protects all citizens of New Jersey from liability for the negligence of a bailee under a contract of bailment made in the State of New Jersey.

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction, as to which there was a distinct and timely insistence that if so applied the statute was void as in violation of the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is reviewable on writ of error under paragraph 237 of the Judicial Code."
>
> Fiske *v.* Kansas, 274 U. S. 380.
>
> Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282.

ARGUMENT

THE APPLICATION OF THE NEW YORK STATUTE TO YOUNG IN THIS CASE, OFFENDS SEC. 10 OF ART. 1 OF THE CONSTITUTION

"No State shall pass any law impairing the obligation of Contracts."

The word "pass," may be synonymous with, "create," or "put into effect."

The Point that the application of the New York Statute to Young in this case "impairs the obligations of contract" cannot be evaded by suggesting that the Statute may have been enacted before Young made his contract of bailment in New Jersey. The Statute may have existed in New York, but it did not exist in New Jersey, prior to Young's contract. It was the "application" of the New York Statute to Young after the contract had been made, of which he complains; the New York Statute had no operation in the State of New Jersey at the time the contract of bailment was made, no more than if it had not yet been enacted in New York; it was the dragging of the New York Statute over the state line into New Jersey, and its application there to Young after his contract was made, which violates the "contract" clause of the Constitution; in other words, no Statute of New York existed in or operated in New Jersey when Young made his contract of bailment; the law of New Jersey at once attached to that contract and protected Young from liability for the bailee's negligence; it was the drawing of the New York Statute over the state line after the contract was made, and giving it its first operation in New Jersey after the contract was, by its application to Young by the

Courts of New Jersey, which impaired his contract: and whether this was done by New York officials or New Jersey officials or a combination of both, is immaterial; it is in any event the action of a State, which has impaired the obligations of Young's contract, in violation of the clause of the Constitution. Neither a single State, nor any combination of States, can wipe out a constitutional right.

The appellant Young was not and had not been in the State of New York; he had no knowledge of the law of New York and was not chargeable with such knowledge, because he was never within the jurisdiction of the Statute's operation; Young was no more chargeable with knowledge of the law of New York, than was the Court in New Jersey; the law of New York had to be proved even to the Court by the introduction of evidence. Balbino, the driver of the car was not Young's agent; was not engaged on any of Young's affairs, the automobile was not being driven for Young, nor about his business; the loan of the automobile was a valid contract of bailment under which Young was protected from liability for the negligence of Balbino by the Law of the State where the contract of bailment was made.

> "Owner not in automobile, being driven by another to whom he had loaned it to bring latter's wife and child from another city, at time of collision, is not liable for injuries to occupant of another car." Gavin *vs.* Cohen, 136 Atl. 330.
>
> See also, N. Y. L. E. and W. R. R. Co. *vs.* N. J. Electric R. Co., 60 N. J. L. 338;
> Doran *vs.* Thompson, 76, N. J. L. 754;
> Maurer *vs.* Brown, 106 N. J. L. 284, 285.

The fundamental premise, inherent in the case is, a contract of bailment is made, the bailee drives off

with the car; and the Law of the State of New Jersey exempts and protects Young from liability for what the bailee does with it.

Young engages in no further activity, does nothing more; so that there is no act of his which can deprive him of his protection and render him liable. What is there then which can strike out his exemption from liability which the lex loci contractus affords him, and impose liability upon him? Can the laws of a sovereignty within whose territory he never was, and under the operation of which he had never come, change his status and impose a personal liability upon him? It is not a question whether the automobile itself could be forfeited under the Law of New York for being in the State of New York, although without the owner's knowledge or consent; perhaps it could be forfeited. The question is, whether he who was never in New York, and whether other property of his which was never in New York, are amenable to the Laws of New York, which laws never reached over either him personally or over his other property, for the reason that neither he nor it was ever within the limits of their territorial operation.

The immunity from liability for the bailee's negligence, which under the Law of New Jersey Young enjoyed, is unaffected by any act of his, for he did no act which affected it after Balbino drove away with the car; this immunity from that negligence remains, and continues to exist, as matter of law, unless it is obliterated and destroyed by the operation in the State of New Jersey of a Statute of New York. Can this be?

STATE STATUTES HAVE NO EXTRA TERRITORIAL OPERATION

That the laws of a state or sovereignty have no extra territorial operation is axiomatic.

> "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction." Sanford *vs.* McDonald, 248 U. S. 185 at 195. 63 L. Ed 200-204.
>
> "The foregoing considerations would lead in case of doubt to the construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the law-maker has general and legitimate power. All legislation is prima facie territorial." American Banana Co. *vs.* United Fruit Co., 213 U. S. p. 347-357, 53 L. Ed. 832.
>
> See also, Pennoyer *vs.* Neff, 95 U. S. p. 714, 24 L. Ed. 565.

It is not a question of the validity of the New York Statute within the limits of the State of New York, if applied to either persons or property within the territorial limits of the State of New York; its validity with respect to such persons and such property may be conceded. But the Court below declined to so limit that statute's operation; the trial court instructed the jury (R. 80) that the New York Statute operated to render Young liable for the bailee's negligence, although Young had never been in the State of New York either actually or constructively; although he believed the bailee would not go into New York; although the bailee Balbino was not Young's agent either by express appointment or by implication; and that although Balbino was not engaged upon Young's business, yet Young was liable in any event, merely because he was the owner of the car.

How could the Courts below have so decided except by giving extra teritorial operation to the New York Statute? The appellee Masci, seems to have urged upon the Courts below, that the question was one of "comity" between states; his idea seems to have been, that the courts of one state will within their own jurisdiction, give active, operative effect to the statute of another state. Such a claim, is at least an inadvertence; there is not and never was any such rule of "comity" in the sense that a state statute could extend over the state line and either deprive a non-resident of an existing right *in personam,* or impose a personal liability upon him. In support of this claim below, were cited cases where statutory causes of action for wrongful death, are enforced in the courts of a state other than that in which the wrongful death occurred; but in none of them was there applied a statutory liability against one who had never been in the State which enacted the Statute.

It is quite true, that the Courts of one state will enforce a transitory cause of action arising in another state; but this is enforcing an existing personal right arising out of the "lex loci"; it is not giving extra-territorial operation to a law, by applying it so as to create a cause of action in another State.

The question of the power to extend the operation of a state statute beyond the territorial limits of the state is directly met and disposed of in N. Y. Life Insurance Co. *v.* Head, 234 U. S. 160, wherein the Court said:

> "* * * And this concession brings us to consider the second general inquiry, which is the power of the state of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other states, so as in such other states to destroy or impair the right of persons

not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri, and although the contract was sanctioned by the law of the state where made. That is to say, the right of a state where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the state in the future, concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the state or original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the state where the contract was originally made. In other words, concretely speaking, we must consider the validity of the loan agreement; that is, how far it was within the power of the state of Missouri to extend its authority into the state of New York, and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer, since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound." 234 U. S. 161, 58 L. Ed. 1264.

The Court further said:—

> "It is illustrated as regards the right to freedom of contract by the ruling in Allgeyer *v.* Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427, and it finds expression in the decisions of this court affirmatively establishing that a state may not, consistently with due process clause of the 14th Amendment, extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." 234 U. S. 162, 58 L. Ed. 1264.
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> "A state statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner who is a non-resident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, as to enforce such personal liability would be a taking of property without due process of law and a violation of the Federal Constitution." C. P. Dewey *v.* City of Des Moines, 173 U. S. 193, 43 L. Ed. 665.

In discussing the sovereign powers of States, and the principles of public law which sustain them, the Court said:—

> "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions

upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story Confl. L., ch. 2; Wheat Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, Confl. L., sec. 539. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 568-569.

Actions in tort are in their nature transitory; in transitory actions liability may be enforced wherever the person against whom liability exists can be found; but "comity" can never impose liability upon one against whom by the law of his situs no liability exists; and in this case, no liability for Balbino's negligence rested upon the appellant Young under the Law of New Jersey, and no liability for that negligence could exist without giving to the New York Statute the effect of reaching over into the State of New Jersey and imposing upon Young the very liability from which he was protected by the law of the state in which all his actions were performed and his contract made. To enforce outside of the State of New York a cause of action against one

who was within the State of New York at the time of the occurrence, and therefore amenable to the Laws of New York is one thing; to carry the Law of New York over into the State of New Jersey and there impose upon one who was never in the State of New York and never amenable to its laws, a liability which the Law of New Jersey exempted him from, is quite another thing. There is no question in this case about whether Young expressly or impliedly consented to the operation of the Laws of New York over him personally by knowingly sending his automobile into that state; the trial court in its charge to the jury left Young no opening for escape upon this ground, for it charged the jury (R. 80) that Young was liable for the negligence of Balbino the bailee, if only, Young loaned his car to Balbino quite independent of where Balbino drove it, or intended to drive it; under the charge of the trial court Young was liable although Balbino had borrowed the car merely to drive it around the corner, under an express agreement with Young that he would not drive it into the State of New York

THE APPLICATION OF THE NEW YORK STATUTE TO THIS CASE OFFENDS THE 14TH AMENDMENT

"Nor shall any state deprive any person of life, liberty or property without due process of law."

The application of the New York Statute to Young in the State of New Jersey, deprives him of "liberty" to make in New Jersey, the State of his domicile, and to enjoy, a contract of bailment which is protected by the Law of that State, and under which contract the lex loci contractus protects him from liability for the negligence of the bailee; this

"liberty" to make and to enjoy contracts is protected by the 14th Amendment.

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned." Allgeyer *v.* State of Louisiana 165 U. S. 589, 41 L. Ed. 835.

In Adair *v.* United States 208 U. S. 161, the validity of an Act of Congress was brought in question; that Act undertook to make it a crime for an officer of an interstate carrier to discharge an employee from service simply because of his membership in a labor organization; in determining whether the Act of Congress was repugnant to the 5th Amendment of the Constitution, the Court in referring to the section of the Act in question said:

> "In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor;" Adair *v.* United States, 208 U. S. 172, 52 L. Ed. 441.

In the Adair case the Court concluded that the Act of Congress in question was repugnant to the

"due process" clause of the 5th Amendment. The phraseology of the "due process" clause of both the 5th and 14th Amendments is identical; and as to the identity of the meaning of the "due process" clause in both Amendments, there can be no doubt; the 5th Amendment being a limitation upon the power of the United States, and the 14th Amendment upon the power of the States.

> "The restraint imposed upon legislation by the due process clauses of the 5th and 14th Amendments is the same." Heiner *v.* Donnan, et al. 225 U. S. 312, 76 L. Ed. 772.

In Coppage *v.* Kansas, 236 U. S. 1, the principles announced in the Adair case were approved, reaffirmed, and applied to a similar statute enacted by the State of Kansas; the state statute was held repugnant to the "due process" clause of the 14th Amendment. In each the Adair and the Coppage case, the Court held that the restriction of the "liberty of contract" undertaken to be imposed by the statute in question, was repugnant to the "due process" clause of the 5th and 14th Amendments respectively.

In Coppage *v.* Kansas the Court said:—

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."
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> 236 U. S. 14, 59 L. Ed. 446.
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> "Competent persons ordinarily have the utmost liberty of contracting, and their agree-

ments voluntarily and fairly made will be held valid and enforced in the courts."

Twin City Pipe Line Co. & Ind. Oil & Gas Co. *v.* Harding Glass Co. 283 U. S. 353, 75 L. Ed. 1112.

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Meyer *v.* Nebraska, 262 U. S. 399, 67 L. Ed., 1045.

"The right of employer and employee to contract with respect to wages is part of the liberty protected by the 14th Amendment to the Federal Constitution."

Charles Wolff Packing Co. *v.* Court of Industrial Relations of the State of Kansas, 262 U. S. 522, 67 L. Ed. 1103.

"The extra territorial operation given to the statute also takes Young's property without due process of law in violation of that amendment under the reasoning of the opinion in N. Y. L. Ins Co. *v.* Head, 234 U. S. 160, above quoted. Owing to the fact that New York cannot give its statute any extra territorial operation, that statute, as applied in this case, amounts to an imposition of liability which the State was without power to impose. It is to that extent as much a taking of property without due process of law in violation of the Fourteenth Amendment as was the attempted extra territorial tax referred to in Frick *v.* Pennsylvania, 268 U. S. 473."

To become amenable to constructive service under the New York statute providing for service on the Secretary of State in actions against nonresident automobile owners, the nonresident must either be operating the automobile personally, or the operation thereof must be through an agent or employee of such nonresident acting within the scope of his employment, and the operation of the statute does not extend to a person not associated with the nonresident owner by agency, but who is merely operating the automobile with the knowledge and consent of the owner. Zurich General Acci. & Liability Ins. Co. *v.* Brooklyn & Q. Transit Corp., 241 N. Y. Supp. 465.

And under this statute providing that in an action by a nonresident "growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle," summons may be served by leaving a copy with the Secretary of State, has no application to an accident which occurs while the car in question was being driven by a repair man, who had undertaken to locate trouble in the car, and who was not accompanied by the owner. O'Tier *v.* Sell, 252 N. Y. 400.

And a similar statute has been held to apply to the one actually operating the car, but not to the employer of one who had charge at the time when an accident occurred. Morrow *v.* Asher (1932; D. C.) 55 F. (2d) 365.

DENIAL OF EQUAL PROTECTION OF THE LAW

The State of New Jersey, through its Courts, in this case, denied the appellant Young the "equal protection of the law" of New Jersey guaranteed by the 14th Amendment. Everyone who makes in New Jersey a contract of bailment such as that at Bar, is protected by the law of New Jersey, from liability for negligence of the Bailee. But in this case, the courts of New Jersey denied Young this "equal protection," by imposing upon him the extra-territorial operation of a New York statute, which when so imposed upon him, denied him the operation and protection of the law of New Jersey. In order to violate the 14th Amendment it is not necessary that the act of the State should be through its legislative body in the form of a statute; the act of any person or authority vested with state power, is sufficient.

> "The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." Scott *v.* McNeal, 154 U. S. 45, 38 L. Ed. 901.

In Carter *v.* Texas, 177 U. S. 442, 44 L. Ed. 839, a negro claimed that in a criminal trial in the state court he had been denied the equal protection of the laws in that the Jury Commissioners had deliberately excluded from the grand jury which found the in-

dictment, all persons of the African race; a motion to quash the indictment was made upon this ground, and the truth of the allegations were offered to be proven; but the Court declined to hear any evidence upon the point, and Carter was tried and convicted. The Supreme Court of the United States reversed the conviction upon the ground that the action of the trial court in declining to hear evidence in support of the charge and to quash the indictment if the charge was proven, denied Carter the equal protection of the law,

> "The exclusion of all persons of the African race from a grand jury which finds an indictment against a negro in a state court, when they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of U. S. Const. 14th Amend., whether such exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the state." Carter *v.* State of Texas, 177 U. S. 839, 44 L. Ed. 442.
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> "The prohibitions and guaranties of U. S. Const., 14th Amend., are addressed to, and control, not only the states, but also every person, whether natural or juridical, who is the repository of state power." Home Telephone & Telegraph Co. *v.* City of Los Angeles, et al. 227 U. S. 278, 57 L. Ed. 510.

See also:

Lee *v.* Hopkins, 118 U. S. 356, 30 L. Ed.

There seems to be no escape from the conclusions which are now to be stated:

1. Young, in the State of New Jersey made a legal and valid contract of bailment, under which the law

of the State of New Jersey protected him from liability for the negligence of the bailee, and the bailee departed with the object of the bailment.

2. Young did no other act or thing which could change his status or deprive him of this protection from liability, which attached to him by the law of New Jersey.

3. The Courts of New Jersey imposed upon Young the extra territorial operation of a New York Statute, the application of which statute in this case imposed a personal liability upon Young who had never been personally within the territorial operation of such statute, and a liability against his other property, which property had never been within the territorial operation of those laws. This, deprived him of liberty, and deprived him of property, "without due process of law."

4. The Courts of New Jersey denied Young the "equal protection of the law" of New Jersey, by denying him the protection from liability for the negligence of the bailee, which the law of New Jersey accorded him under the terms of the contract of bailment.

5. The New York Statute as applied in this case, violates the Constitution of the United States. For all or either of these reasons, that the judgment below should be reversed, is

Respectfully submitted,

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